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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Carriage of the Transmission  
of Digital Television Broadcast Stations

Amendments to Part 76  
of the Commission's Rules

CS Docket No. 98-120

REPLY COMMENTS OF PREVUE NETWORKS, INC.

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**REPLY COMMENTS OF PREVUE NETWORKS, INC.**

Prevue Networks, Inc. ("Prevue Networks" or "the Company") submits these Reply Comments in response to comments filed in the captioned proceeding addressing issues raised in the Commission's Notice of Proposed Rule Making ("NPRM") released July 10, 1998.

**SUMMARY**

Prevue Networks opposes rules that would require cable operators to carry broadcasters' digital signals during the broadcast industry's transition from analog to digital. Prevue Networks agrees with the comments filed by cable television operators and cable television programming networks in this proceeding demonstrating that the imposition of a digital must-carry requirement is not within the Commission's statutory authority and would interfere with the First and Fifth Amendment rights of cable operators and cable television programming networks. Prevue Networks also supports those comments that explain that any potential benefits of a digital must-carry requirement are clearly outweighed by the harm that would be inflicted on existing and

developing cable programming networks -- networks that would be dropped by necessity from channel-challenged cable systems to make room for redundant, partially programmed digital must-carry signals. In addition, the Commission should not even consider adopting such a requirement at a time when only a small fraction of America's television viewers could afford to purchase television receivers that are capable of transmitting high definition television signals, when digital technology is still in its infancy, and market-place negotiations for carriage are making progress.

In addition to being opposed to digital must-carry in general, Prevue Networks also opposes any rules that would regulate competition between electronic program guide ("EPG") services or require pass-through of EPGs as part of the digital broadcast signal. The commenters that have filed comments in this proceeding supporting such rules have one goal in mind: the provision of a government subsidized line of business. The commenters have formulated business plans in connection with their EPG services which are predicated on a "free ride" on cable systems, and perhaps more importantly, bypassing competition with other EPGs for carriage. Without unnecessary regulation, all companies seeking to offer EPGs will simply compete in an open marketplace with other EPG providers for the right to use cable systems to transmit their signals. The Commission should not interfere where, as here, the free market is working as intended.

Moreover, the Commission's authority to promulgate rules concerning broadcasters' channel positioning options does not include unlimited authority to regulate all entities whose services display cable operators' channel line-ups. Unlike Section 653(b)(1)(E), which instructs

the Commission to promulgate rules prohibiting discrimination by open video system ("OVS") operators in favor of affiliated services, including EPGs, Sections 614 and 615 are silent concerning EPGs. Even if the Commission believes it has such authority, none of the entities filing initial comments in this proceeding have demonstrated that broadcasters' channel positioning rights are jeopardized by existing EPG services. In fact, today's EPG services, such as those offered by Prevue Networks, provide viewers with a non-discriminatory line-up of each cable system's program offerings, including broadcast and cable offerings. Thus, the Commission should refrain from promulgating rules governing EPGs until concrete evidence surfaces that discrimination is a problem.

Nor may the Commission promulgate rules requiring cable operators to pass through EPG signals as part of the must-carry broadcast signal. EPG signals are not "program-related." They are "ancillary and supplementary" services expressly excluded by Congress from the must-carry requirements. Clearly, the Commission lacks statutory authority to adopt rules requiring pass-through of program guides. Moreover, if the Commission were to adopt a pass-through requirement for unaffiliated program guides, what would prevent unaffiliated programming networks from seeking the same relief?

In sum, Prevue Networks opposes any digital must-carry requirements. Prevue Networks also opposes any rules that seek to replace marketplace transactions among competing EPGs with unwarranted and unnecessary governmental regulations.

## I. INTRODUCTION

Prevue Networks<sup>1</sup> is a leading provider and pioneer of EPG services to television viewers in the United States. Prevue Networks first debuted its system-specific, text-only on-screen EPG in December 1981. Over the past seventeen years, the Company has invested over \$100 million dollars to develop and deliver innovative EPG services that provide consumers with program information and video content to facilitate viewing in the rapidly expanding universe of television programming sources. Prevue Networks has successfully negotiated carriage of its EPG services with numerous cable television and satellite operators, and is currently available in over 2200 cable television systems throughout the country. As a result of hard work, substantial investment and dedication, Prevue Networks' EPG services are now received by over 50 million television viewers.

Prevue Networks' EPG services include:

- **Prevue Channel**, a scrolling EPG that provides consumers with program listings and information for the broadcast and cable networks carried by their local cable television system. The program listings on Prevue Channel are presented to consumers numerically, by the channel numbers assigned by the local cable television system. Prevue Channel's half-screen format allows video promotion of broadcast and cable network programs to further assist viewers in making their viewing choices.
- **Prevue Interactive**, an interactive EPG designed for use on digital set-top converter

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<sup>1</sup>Prevue Networks is a subsidiary of United Video Satellite Group, a company owned in part by Tele-Communications, Inc. Prevue Networks is not affiliated with any cable operators other than Tele-Communications, Inc.

platforms. Prevue Interactive allows consumers to easily navigate through their television channel line-up and obtain additional information regarding the vast array of program choices available. Users may choose to view program listings by channel number, genre or start time. Viewers can also use Prevue Interactive's search tools to find specific programs by title. Prevue Interactive also provides viewers with ratings information on each program listed (if available), as well as a parental control feature that allows the subscriber to restrict the viewing of objectionable programming.

- **Prevue Express**, an interactive EPG designed for use on analog set-top converter platforms, that provides users with program information and navigational assistance similar to that offered by Prevue Interactive. Program listings are presented to consumers electing to view their listings by channel in numerical order, according to the channel numbers assigned by the local cable television system, by both Prevue Interactive and Prevue Express.
- **Sneak Prevue**, a system-specific EPG designed to highlight pay-per-view offerings available to consumers. Sneak Prevue provides viewers with information regarding channel location, start times and pricing of pay-per-view offerings, as well as video previews of the available programming.
- **Prevue On-Line**, an Internet-based EPG, located at [www.prevue.com](http://www.prevue.com), that allows users to access the channel line-up of their cable and/or satellite television providers on an interactive basis. As with Prevue Network's other interactive EPG services, program listings are presented to consumers electing to view their listings by channel in numerical

order, according to the channel numbers assigned by their cable and/or satellite television provider.

None of the services offered by Prevue Networks discriminates in favor of cable affiliated program networks or against broadcasters. Prevue Networks currently logs and provides listing information on approximately 2100 programming sources, including 1650 broadcast sources, such as local network affiliates and independent broadcasters.

Prevue Network's EPG services compete for carriage and distribution on cable systems with a variety of other electronic program guide services, in addition to competing for consumer attention and usage with printed program guides. In addition, Prevue Channel and Sneak Prevue are analog services, requiring the allocation of a 6 MHz channel for carriage by cable systems. Therefore, Prevue Networks must compete with all other cable networks for scarce analog capacity.

The competitive landscape for EPG services, and the complete lack of any evidence presented by any commenters of discrimination against broadcasters, obviates any need for the Commission to regulate competition among EPG services.

## **II. PREVUE NETWORKS OPPOSES A DIGITAL MUST-CARRY REQUIREMENT.**

### **A. A Digital Must-Carry Requirement Exceeds The Commission's Statutory Authority And Would Not Pass Constitutional Muster.**

As demonstrated in numerous comments filed by cable television operators, cable programming networks and public interest groups in this proceeding, the Commission lacks statutory authority to expand the analog must-carry rules to include digital signals and effectively double the carriage requirements for cable operators. Nothing in Section 614 of the Act or Title VI in its entirety expressly authorizes the Commission to require cable operators to carry both broadcasters' analog and digital signals during the transition. Moreover, Section 624(f) of the Act precludes the Commission from imposing carriage requirements on cable operators unless expressly authorized in Title VI. In fact, requiring cable operators to carry broadcasters' analog *and* digital signals actually contravenes the Act's prohibition on carriage of duplicating signals.<sup>2</sup>

Imposition of a digital must-carry requirement would also violate the First and Fifth Amendments of the Constitution. The Supreme Court only narrowly upheld the Act's analog must-carry requirements against constitutional challenge.<sup>3</sup> In scrutinizing the statute's constitutionality, the Court found that the record developed by Congress supported Congress' stated goal: the preservation of free over-the-air broadcast television.<sup>4</sup> In contrast, in the case of

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<sup>2</sup>Section 614(b)(5) of the Act provides: a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. 47 U.S.C. § 534(b)(5).

<sup>3</sup>*Turner Broadcasting System, Inc. v. FCC*, 580 U.S. 180 (1997).

<sup>4</sup>117 S. Ct. at 1186.

digital must-carry, the Commission's stated governmental interest -- the smooth transition to digital -- is far less substantial. Moreover, the record in this proceeding does not show that a must-carry requirement would further the Commission's stated interest.

In addition, the competitive and technological landscapes have changed dramatically since *Turner* was decided, and cable operators may no longer be viewed as a bottleneck to broadcast distribution. A/B switch technology now exists that enables cable television viewers to switch to over-the-air broadcast signals via remote control, and equipment manufacturers confirm that off-air reception of digital broadcast signals will not be a problem.<sup>5</sup> In addition, other MVPDs have emerged and are offering increased competition to cable operators. It is extremely doubtful that the Court would uphold a digital must-carry requirement as constitutional.

**B. A Digital Must-Carry Requirement Would Harm Prevue Networks' Ability To Maintain And Increase Distribution For Its Prevue Channel Service And Is Not Otherwise In The Public Interest.**

Prevue Networks transmits its Prevue Channel service over cable systems using a 6 MHz channel. As such, it competes for carriage with cable television programming networks and local broadcasters who elect retransmission. Thus, the same concerns expressed by programming services such as Discovery, Lifetime, Home and Garden Television, Food TV, A&E, and others in their initial comments to the Commission apply equally to Prevue Channel.

Prevue Channel's revenue stream -- affiliation fees and advertising -- is dependent upon the network's maintaining and increasing subscriber distribution levels. However, despite

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<sup>5</sup>See *Comments of Philips Electronics* at 14-15; *Comments of Consumer Electronics Manufacturers Association* at 26 (expressing confidence "that DTV receivers will be capable of receiving and displaying off-the-air signals with excellent picture quality.").

advances in digital transmission and plant upgrades in the larger systems, extant analog channels on cable systems remain scarce. A digital must-carry requirement would directly and dramatically reduce already scarce extant channel capacity, and reduce viewer programming alternatives and choice. If cable operators were forced by a digital must-carry requirement to double their carriage of broadcast signals, they would necessarily begin to drop existing cable networks from their line-ups. Just like any other analog channel, Prevue Channel's carriage would be jeopardized.

**C. Any Rules Regulating Carriage Of Broadcaster's Digital Signals Are Premature.**

The present record does not justify imposition of a digital must-carry requirement. Broadcasters are just beginning to transmit digital broadcast signals and have yet to transmit an entire 24 hour signal in digital. Similarly, manufacturers still are working to incorporate recent technology into television sets and receivers to make them compatible with broadcast and cable reception, and to reduce the retail price to the consumer for of all the equipment needed to receive the signal. It remains to be seen whether and when digital broadcasting will become a 24-hour reality for the typical American consumer. As Chairman Kennard has acknowledged, "Nobody knows the answer to the who, what, where, when and how of digital TV."<sup>6</sup> Certainly, Congress and others have recognized that the transition period may need to be extended. Moreover, cable television operators and broadcasters are beginning to make carriage agreements

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<sup>6</sup>Remarks of Chairman Kennard before the International Radio and Television Society, New York, NY, Sept. 15, 1998.

in the absence of regulation,<sup>7</sup> further demonstrating that regulation at this time is, at least, premature.

### **III. THE COMMISSION LACKS AUTHORITY TO REGULATE COMPETITION BETWEEN EPGs.**

The Commission's NPRM suggests that it has authority to regulate program guide services as part of its authority under Sections 614(b)(6) and 615(g)(5) of the Act to promulgate rules concerning channel positioning. NPRM at ¶ 82. Specifically, the Commission asks whether "any rules are necessary to ensure fair competition between electronic programming guides controlled by cable operators and those that are controlled by broadcasters." *Id.*

A few broadcasters, equipment manufacturers and an EPG service filed comments responding to the Commission's inquiry.<sup>8</sup> Not surprisingly, they all recommend that the Commission adopt rules that replace marketplace competition among EPGs with regulation limiting operators' choices in the EPGs made available on their systems. These commenters see a potential opportunity to launch new services without competing head-to-head in the marketplace with established EPGs at the cable operator level. Unable to cite to actual discrimination in the marketplace, these commenters cite to the *potential* for such discrimination.<sup>9</sup> They ask for rules

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<sup>7</sup>Monica Hogan, Leslie Ellis, *Time Warner, CBS Ink HD Deal*, MULTICHANNEL NEWS, Dec. 14, 1998, at 1.

<sup>8</sup>*Comments of National Broadcasting Company, Inc.* at 4-7; *Comments of Thompson Consumer Electronics, Inc.* at 15-16; *Comments of Benedek Broadcasting Corp.* at 22-23; *Comments of Sony Electronics Inc.* at 8-9; *Comments of the Association of Local Television Stations, Inc.* at 74-75; *Comments of Gemstar International Group Limited and Starsight Telecast, Inc.*, at 10-14.

<sup>9</sup>*See, e.g., Comments of Gemstar International Group Limited and Starsight Telecast, Inc.*, at 11 (listing *potential* effects of cable operators controlling VBI); *Comments of Benedek*

similar to those imposed on OVS operators as required by Section 653(b)(1)(E) of the Act.

However, unlike Section 653, Sections 614(b)(6) and 615(g)(5) of the Act do not instruct the Commission to adopt rules requiring the Commission to regulate competition among EPG services. Nor may these sections of the Act be construed to provide the Commission with authority to regulate EPGs. The language of both sections is expressly limited to broadcasters' channel positioning options at the time they demand carriage. Nowhere in the text of either section is there any implied authority for the Commission to regulate other services simply because they offer information about the location and availability of program offerings on the system.

In contrast, Section 653(b)(1)(E) of the Act expressly instructs the Commission to promulgate regulations prohibiting OVS system operators from discriminating in favor of its affiliates in the way material or information is presented to subscribers, including the display or promotion of such services on program guides. The fact that Congress was so specific in its requirements governing OVS operators further demonstrates that Congress did not intend to grant the Commission authority to impose similar rules on cable operators. Canons of statutory construction dictate that Congress' express inclusion of the EPG restrictions in Section 653(b)(1)(E) and its omission of such language in Sections 614 and 615 demonstrate Congress'

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*Broadcasting Corporation* at 22 ("the cable system has the *capability* to discriminate against broadcast programming by placing it in a disadvantageous position in the EPG") (emphasis added).

intent not to regulate EPGs in Section 614 and 615.<sup>10</sup>

Moreover, the record in this proceeding is entirely void of any evidence demonstrating discrimination against broadcast signals in the EPG market. As explained in the Introduction section, Prevue Networks' EPG services list virtually all of the channels and program offerings of a particular cable system, including broadcast and cable programming. Prevue Channel and Prevue Online list a cable system's programs sequentially by channel number, which actually results in broadcast programming be among the first programs listed. Prevue Interactive gives viewers complete control over the channel selection process. Viewers may choose to view program listings by start time, channel number, format or genre, such as movies, sports or children's programming. Viewers can also use the guide's search tool to find specific programs by title. The options available to viewers in no way discriminate against broadcasters.

In sum, the Commission lacks statutory authority to adopt rules regulating competition among EPG services. Moreover, the record is entirely barren of evidence that would justify such a requirement.

#### **IV. THE COMMISSION LACKS AUTHORITY TO REQUIRE CABLE OPERATORS TO PASS THROUGH EPGs OR INTERACTIVE SERVICES AS PART OF THE BROADCAST SIGNAL.**

One commenter, Gemstar International Group Limited and Starsight Telecast, Inc. (referred to herein as "Gemstar"), requests the Commission to adopt rules requiring the pass through of EPG signals as part of the must-carry broadcast signal.<sup>11</sup> Gemstar's request is unsound

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<sup>10</sup>Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION (5th Ed. 1992) at § 47.02 (entire act must be read together) and § 47.23 (maxim of *expressio unius est exclusio alterius* commands that Congress' omissions be deemed to be exclusions).

<sup>11</sup>*Comments of Gemstar International Group Limited and Starsight Telecast, Inc.*

for numerous reasons.

EPGs, such as those described by Gemstar, are not "program related material," which cable operators are required to transmit as part of their must-carry obligations. Rather, EPGs, such as that offered by Gemstar, fall within the category of "non-program related material (including teletext and other subscription and advertiser supported information services)," which the operator may chooses to carry in its sole discretion.

Section 614(b)(3) of the Act specifically states that "[r]etransmission of other material in the VBI or other non-program related material (including teletext and other *subscription and advertiser supported* information services) is at the discretion of the operator." 47 U.S.C. § 534(b)(3) (emphasis added). Gemstar's EPG is just such a "non-program related" service.<sup>12</sup> Gemstar's service is sold directly to consumers for use with equipment licensed by Gemstar, including televisions, VCRs, TVCRs, satellite integrated receiver descramblers, cable television set-top boxes, and stand alone receivers. Equipment Compatibility Reply Comments at ¶ 9. Gemstar subscribers receive the program schedule data through the VBI of broadcasters or other programmers licensed by Gemstar to transmit the service. *Id.* at ¶ 12. The VBI data "feeds" the Gemstar-licensed equipment. Comments at 2. Gemstar's service is advertiser supported. See Exhibit 1 (Price Coleman, *First You've Got To Get Their Attention*, Broadcasting & Cable, Nov. 9, 1998, at 50-54). Thus, Gemstar is an "advertiser supported" "subscription" service and is, thus,

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<sup>12</sup>While Gemstar's comments do not provide a very thorough description of its service here, Starsight provided a description of its service in earlier comments filed in the navigation devices proceeding. See Reply Comments of Starsight Telecast, Inc. in CS Docket No. 97-80, *Implementation of Section 304 of the Telecommunications Act of 1996 -- Commercial Availability of Navigation Devices*.

not program-related.

In the analog must-carry proceeding, the Commission adopted factors enumerated in *WGN Continental Broadcasting, Co. vs. United Video Inc.*, 693 F.2d 622 (7th Cir. 1982) ("WGN") for establishing whether a transmission in the VBI is program related. *Memorandum Opinion and Order*, 9 FCC Rcd 6723 at ¶ 42 (1994). To be considered program related under WGN: (1) the programmer must intend for the information in the VBI to be seen by the same viewers who are watching the video signal; (2) VBI information must be available during the same interval of time as the video signal; and (3) VBI information must be an integral part of the program. While the WGN factors are not the sole test for determining whether material is program related, the results of applying the WGN factors are "the best guidance for determining whether material in the VBI is program-related and, therefore, must be carried by the cable system." *Id.* at ¶ 50.

EPGs such as Gemstar, which display program listings for all or the majority of the channels on a multichannel video programming distributor ("MVPD"), do not constitute an integral part of the program to which the data stream is attached. The EPG may list that particular program as one of hundreds available to the consumer at any given time of day. *See* Gemstar Comments at 2-3. Program guides are navigational tools for an entire MVPD channel line-up and cannot be classified as "integrally related" with a particular program.

The Commission declined Starsight's request to find that EPGs were program related in the analog must-carry rulemaking process. *Memorandum Opinion and Order*, 9 FCC Rcd at n. 145. There it determined that Starsight's request should "not be resolved in the context of a rulemaking proceeding, but rather should be dealt with separately through the special relief

process." *Id.* As far as this commenter was able to glean from FCC records, neither Starsight nor Gemstar have sought to obtain must-carry status for their EPG service through the special relief process.


EPGs, such as Gemstar, that use the VBI to transmit their material are actually "ancillary and supplementary" services. Section 336 of the Act provides that "no ancillary or supplementary service shall have any right to carriage under section 614 or 615." 47 U.S.C. § 336. While Section 336 does not define these services, the Commission's rules specify that ancillary or supplementary services "include, but are not limited to computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [or] subscription video." 47 C.F.R. § 73.624. Interactive EPGs, such as that offered by Gemstar, which consist of data transmissions to be used on an interactive basis by the EPG's subscribers, fall squarely within this definition.

In sum, EPGs are not program-related material entitled to pass-through with the principal broadcast signal. Instead, EPGs are ancillary and supplementary services, which Congress clearly excluded from the must-carry requirements.

## **CONCLUSION**

For the foregoing reasons, Prevue Networks opposes adoption of a digital must-carry requirement as well as the adoption of rules that would regulate competition between EPGs and/or mandate pass-through of certain EPG services as part of the cable operator's must-carry responsibilities.

Respectfully submitted,

  
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